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No. 78-223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

AND

LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO)
Intervenor,

V.

BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE UNION

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ARGUMENT

The Hospital's basic argument is that it did, on this record, "justif[y] the prohibition [on union solicitation and distribution] as necessary to avoid disruption of health care operations or disturbance of patients" (*Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 489). (Br. for Resp. at 15). In making this argument, however, the Hospital engages in a massive rewriting of the record, producing an interesting pastiche which bears little resemblance to the

record actually made at the administrative hearing. Further, the attempt to present this case as one involving simply the substantiality of the evidence in support of the Board's holding belies the fact that serious legal questions are buried in the evidentiary dispute—most notably, whether the Board's traditional role of balancing the interests of employees and management can be usurped by the simple expedient of producing conclusory "expert" testimony in support of the balance struck by the employer.

1. The distortion of the factual record indulged in by respondent is of particular significance for two reasons. First, the Hospital endeavors to present this case as solely a factual dispute, divorced from any significant legal questions. If this, indeed, is determined to be the case, then a precise delineation of the facts becomes all-important. Second, clear errors and unsubstantiated assumptions similar to those presented here by respondent found their way into the Court of Appeals opinion; in part for that reason, this Court cannot, as it normally does (*Labor Board* v. *Pittsburg S.S. Co.*, 340 U.S. 498, 503), rely upon the lower court's assessment of the substantiality of the evidence. Consequently, we set out below some, although by no means all, of the "facts" relied upon by respondent (and, in many cases, by the court below) which have no basis in the record.

A. *Genesis of the 1974 Rule*

Respondent insists that the 1974 no-solicitation/no-distribution rule was not a new or revised policy but simply a "clarification" of existing policy. (Br. for Resp. at 6-7). One need go no further in refuting this position than the text of the 1974 rule: "The solicitation and distribution policy of Baptist Hospital *has been revised.*" (A. 75, emphasis supplied). Further, the timing of the promulgation

of the new rule—October 4, 1974, after one month of union organizational activity—as well as the fact that Mr. French was not disciplined simply for soliciting in the cafeteria prior to October 4, 1974 although he was doing so regularly, tend to confirm one of the two *contradictory* versions of the rule's genesis presented by Mr. Victory—that there *was* a change from past practice, and that it was prompted directly by the organizational campaign (A. 5-6). At any rate, for present purposes the most important fact concerning the origin of the 1974 rule is undisputed—that, while legal counsel was consulted, *no* medical advice was sought (A. 21-22, 72-73).

B. *Character of the Cafeteria*

Respondent seeks to convey the impression that "patients and their visitors constitute about 32 percent of the cafeteria's patrons on weekdays and about 53 percent on weekends." (Br. for Resp. at 13). Actually, aside from all the other defects with the "study" relied upon (Br. for Union, at 8 n. 7), that "study" did not attempt to determine how many patrons were patients, or how many were visitors; it simply sought to establish the percentage of "non-employees." (A. 26-27). The results of the considerably more careful study in *Beth Israel* show that this is a critical oversight. In *Beth Israel*, less than 77 percent of the cafeteria patrons were employees of the hospital, yet only 1.56 percent were patients, and only 9 percent were visitors. *Beth Israel, supra*, 437 U.S. at 490,[1] the remainder were

[1] While the opinion states that 77 percent were "employees," some of those persons, although they worked regularly in the hospital, were paid by Harvard University rather than by Beth Israel. See *Beth Israel Hospital, supra*, No. 77-152 Brief for the Union at 4 n.4.

students, volunteers, attending physicians, women's auxiliary members, and private duty nurses (*Beth Israel, supra,* Brief for the Union at 4), all categories of persons likely to be present at any hospital. Further, while the precise percentage of patients using the cafeteria at Baptist is not known, there is undisputed testimony, from Hospital witnesses that such use is only on "rare occasions." (A. 50).

The Hospital also maintains that its cafeteria is not a "natural gathering place" for the Hospital's employees (Br. for Resp. at 21) and that "there is no evidence that the majority of the Hospital's employees go to the main cafeteria during their relief periods" (*id.*, n. 13). Mr. Victory, however, testified that the cafeteria is an area where the employees relax (A. 12), and that employees who are in the cafeteria are normally on break or lunch period (*id.*). There was, in addition, explicit testimony that employees "normally" take their breaks "[i]n the cafeteria or the snack bar" (A. 49), see also A. 51, A. 71 ("most people took their breaks" in the cafeteria).

Further, respondent heavily relies upon the Sixth Circuit's statement that there are, at Baptist, a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply." (Pet. App. 10a.) The Court of Appeals, however, was under the plainly erroneous impression that there were "several" employee lounges, rather than two (Pet. App. 3a) and seemed unaware of the fact that those two lounges catered to specialized groups of employees. (A. 17-18.) The court below also considered the parking lot as an area open to solicitation (Pet. App. 11a; see Br. for Resp. at 12), despite testimony by Mr. Victory that, as the rule on its face would suggest,

no organizational activity is permitted there. (A. 15-16.)[2]

Moreover, the uncontradicted testimony is that nurse's stations and utility rooms are *not* available for "distribution," as the Court of Appeals believed; that, while certain individuals present in nurse's stations may be on break (A. 26), there are likely to be present, at any given time, persons working (A. 18); that employees have never been *told* that nurses' stations are not considered areas open to the public for solicitation purposes, even through there is limited public access. (A. 19); and that, while utility rooms are "sometimes" used as break areas (A. 18), such usage is not prevalent (A. 49, 71). Thus, the "large *number*" of areas the lower court supposed available plainly do not, as respondent suggests and the court below seemed to believe, provide a substantial opportunity to reach most employees.

The Hospital also manufactures a distinction between its hortatory rule regarding conversations with other employees on particular patients—"be particularly careful * * * in places of public assembly" (A. 98-99)—and that in *Beth Israel*—"restrict the voicing of your clinical discussion." (437 U.S. at 503 n.20.) (See Br. for Resp. at 23.) A difference beyond the particular words used to express

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[2] Mr. Victory later seemingly contradicted himself once again, stating that an employee "would be permitted to distribute or solicit in the parking lot as long as it didn't became a nuisance with litter," (A. 34). At the same time, he acknowledged that the rule states otherwise and that the Hospital enforced its rules as written (*id.*). Obviously, employees cannot be expected to read Mr. Victory's variable mind when deciding what activity to undertake. Therefore, unless there were evidence—which there is not—that an exception to the written rule was publicly announced, the rule must be taken to apply as promulgated.

the same thought cannot be discerned. Thus the statement that "there is no evidence * * * that the Hospital has adopted a less restrictive approach to behavior in the cafeteria * * * as disquieting * * * as union solicitation" (Br. for Resp. at 14) is false.

Similarly, while the Hospital stresses "uncontradicted testimony by * * * French acknowledging that his union solicitation had already resulted in untoward incidents involving open expressions of hostility *between employees*" (Br. for Resp. at 23 emphasis supplied), the "uncontradicted testimony" is the opposite. French simply testified that certain people he solicited in the cafeteria "expressed open hostility *toward the union*"; none "expressed open hostility toward [French]" (A. 68, emphasis supplied.) The Hospital fails to explain what is "untoward" about an employee expressing his adverse views about unions to another employee, as long as no disruption occurs. (See Br. for Union at 27, n.23.) Indeed, while a union organization campaign is going on in a hospital one would expect simply conversations among employees concerning the union in the cafeteria even if no solicitation were permitted there; and, such discussion could well include expression of "likes and dislikes" with respect to the union" (A. 68) which is all that the "untoward" incident of "hostility" actually amounted to. Further, while the Hospital refers to "the *overheard* conversations" (Br. for Resp. at 23, n.19, emphasis supplied) there is *no* evidence that conversations were overheard. In fact, as in *Beth Israel*, there is no evidence that any patient or visitor was ever even aware of, much less disturbed by, union activity in the Baptist cafeteria while it was permitted to continue.

C. *The Medical Testimony*

Respondent, and the Court of Appeals, rely most heavily upon the supposed "highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for the no-solicitation rule." (Br. for Resp. at 23-24; see also Pet. App. 7a-8a). But that testimony, when reviewed in detail (see Br. for Union at 10-11; 24-28) does not at all show "medical necessity for the no-solicitation rule." Rather, the doctors, with no first-hand experience of union activity were competent only to testify in response to *hypothetical* situations; the situations presented to them were those in which union activity had become "volatile, hostile or heated" (A. 40, 42) or took the form of "turmoil, confusion, loud noises * * * a general meeting [or] a speech." (A. 53, 62, 63-64.) Thus, the Administrative Law Judge's refusal to find in this hypothetical testimony significant evidence of real-world "medical necessity" for the solicitation rule (Pet. App. 75a) was entirely justified by the character of the testimony given, and by a common-sense evaluation of that testimony requiring no medical expertise.[3]

Furthermore, despite suggestions to the contrary, (Br. for Resp. at 20) there is no expert testimony in this case regarding a special *medical* emphasis upon controlled mobility or "relat[ing] such [medical] practices * * * to its cafeteria." (*Beth Israel, supra*, 437 U.S. at 517 (Powell, J., concurring).) The doctors did testify that at various points in their hospital stay many patients *are* mobile (A.

[3] For example, as the ALJ noted, the great stress placed by the doctors upon the need to shield patients from all *conceivable* sources of upset is belied by the presence of newspapers, televisions, and radios in hospitals. (Pet. App. 75a.)

40-41, 54-55). But, while patients may be permitted to go down to the lobby, or to the cafeteria (*id.*) there is no indication whatever that the hospital's medical care program ever required or encouraged any patient to use the cafeteria, the lobby, or any other non-patient care area.

The factual errors reviewed above do not appear to us to be instances in which a rational program could view the evidence as "tilting" one way or the other (see *NLRB* v. *Pittsburg S.S. Co., supra,* 340 U.S. at 503). Rather, the statements of "fact" made by respondent and, in some cases, echoed by the Court of Appeals, are either made of whole cloth or are general emotion-charged characterizations of evidence which, upon detailed examination, cannot possibly carry the weight placed upon it.[4]

2. The heavy emphasis upon the "medical" testimony is important for another reason. It illustrates that this is *not* a case involving simply the substantiality of the evidence. As we discussed at length in our opening brief (at pp. 24-29) the Court of Appeals' reliance upon the doctors' testimony as the basis for overturning the Board's determination of the appropriate balance between the Hospital's patient care interest and the employees' self-organization interest, evinces a misapprehension of the deference appropriately due the NLRB in administering the Act. Insofar as

[4] Further, the internally inconsistent nature of much of the evidence produced by the Hospital—particularly, the self-contradiction in the testimony of the Hospital's primary witness, Mr. Victory,—certainly do not entitle the respondent, and the court below, to seize upon that part of the evidence they would have preferred to credit, and to contend that the Board's determination was not based on substantial evidence on the record as a whole. The Board was, in this circumstance, entitled to make credibility determinations and to establish which portion of the evidence was believable.

the doctors testified that loud noises, violence and disturbance could be harmful to patients, their testimony was perhaps entitled to some consideration. But the doctors were not, as they conceded, experts upon or, even, knowledgeable about the real likelihood of such disturbances occurring due to union activity. Their testimony that it is necessary to the Hospital's mission to ban union solicitation is therefore simply an opinion upon whether or not the unknown risk of such disturbance is worth taking. And precisely because it is formed against a lack of knowledge of labor relations facts and law such an opinion is unlikely to represent a balancing of risks consistent with that required by the national labor policy. Thus, even when there is no contrary testimony by other medical experts, the Board is surely not required to accept as conclusive statements that run counter to common experience about hospital standards of care—for example, statements suggesting that patients in a busy cafeteria will be harmed if off-duty staff persons are not "concerned exclusively with patient care" (Pet. App. 8a).

The court below in taking its quite different view of the deference to be accorded the doctors' testimony relied in part upon "Congressional concern for the special circumstances of hospitals as shown by the legislative history of the 1974 Amendment," (Pet. App. 9a). This Court's *Beth Israel* opinion, however, squarely rejected the notion that the 1974 Congress intended the Board's function in hospital cases to differ from that exercised in cases arising in other industries. (437 U.S. at 496-501.) Thus, the Court of Appeals, in requiring the Board to accept the risk-balancing preferences of medical experts testifying for the Hospital, was applying an erroneous standard of review, based upon

a mistaken understanding of the 1974 Amendment. In such a circumstance this Court does have a duty to intervene to assure that the proper balance between the role of the NLRB and that of the Courts of Appeals is restored. (*Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 491.)

CONCLUSION

For the reasons stated in the Union's opening and reply briefs, the judgment of the Court of Appeals for the Sixth Circuit should be reversed. Failing that, the judgment below should be vacated and the cause remanded with instructions to remand to the NLRB for further factual development.

Respectfully submitted,

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